142

(4)

No. 09-3

Supreme Court, U.S.
FILED
OCT 14 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DAEWOO ENGINEERING & CONSTRUCTION CO., LTD.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

REPLY BRIEF FOR THE PETITIONER

Thomas C. Goldstein
Counsel of Record
Thomas P. McLish
Paul W. Killian
Troy D. Cahill
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000

October 14, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
REPLY BRIEF FOR THE PETITIONER 1
CONCLUSION 9

TABLE OF AUTHORITIES

STATUTES

41 U.S.C. § 604 ..... passim

LEGISLATIVE MATERIALS

S. Rep. No. 95-1118, 95th Cong., 2d Sess. (1978) 7, 8

REPLY BRIEF FOR THE PETITIONER

Certiorari is warranted because the Federal Circuit's erroneous construction of the statute governing almost all substantial government contracts contravenes Congress's intent and will chill companies' willingness to contract with the government or, at the very least, to identify and avoid significant cost overruns. Given that petitioner faithfully completed the contract at issue in this case, even after suffering losses of more $100 million, there can be no serious argument that petitioner's claim rested on a fraudulent premise that it was entitled to any adjustment in the contract amount. The Solicitor General's attempt to resuscitate the ruling below rests on a significant misinterpretation of the Federal Circuit's holding.

1. Section 604 of the Contract Disputes Act provides for a penalty equal in amount to the part of a contractor's claim that is unsupported because of misrepresentation of fact or fraud. Here, the Federal Circuit affirmed a judgment for the government under Section 604 for the full amount of Daewoo Engineering & Construction Co., Ltd.'s (DWEC) $50.6 million projection of future damages, though on a different ground than adopted by the trial court.

Rather than assess a penalty equaling the amount of the specific components of petitioner's claim that it had found fraudulent (such as certain costs that were duplicative or inflated), the trial court imposed a penalty in the full amount of the entire $50.6 million projection. The trial court's rationale was that DWEC's *purpose* in submitting the projection – to persuade the government to modify

the contract terms to avoid those costs to the government – rendered the whole projection a "negotiating ploy," which the trial court deemed *ipso facto* fraudulent. Pet. App. 77a-78a, 148a, 150a.

Critically, however, that basis for deeming the whole projection fraudulent has now dropped out of the case. The Federal Circuit did not adopt the trial court's view that DWEC's submission of a future damages projection in order to encourage the government to revise the contract made the claim fraudulent. That is not surprising: if adopted, the trial court's view – that a contractor who alerts the government to impending cost overruns if the contract is not modified is engaging in a fraudulent "negotiating ploy" – would effectively prevent the government from learning of and acting upon opportunities to save significant sums of money, to the detriment of the public fisc. Thus, the Federal Circuit explained that a contractor may permissibly seek projected future costs in a Contract Disputes Act claim. Pet. App. 8a. For its part, the government concedes that "claims for future costs are permissible." *Id.*

The lower courts did not identify any alternative basis for deeming petitioner's entire claim to be fraudulent. As the Federal Circuit acknowledged, the trial court did not find that the claim rested on a fraudulent premise or theory, which could produce a finding that the entire claim was fraudulent. Nor did the court of appeals find that DWEC committed fraud merely in submitting a projection of future damages.

The Federal Circuit nonetheless held as a matter of law that the government was entitled to a penalty in the full amount of the projected damages. The court of appeals rested its ruling on the finding that in the "calculation" of its projection, petitioner had included costs arising from "delay" without determining if there "was any contractor-caused delay or delay for which the government was not responsible." Pet. App. 13a. The Federal Circuit thus criticized petitioner's methodology as not sufficiently careful, but it could not, and did not, find that petitioner had thereby committed *fraud*.

The Federal Circuit's ruling that a contractor's error or lack of sufficient care in computing an element of a claim will be transformed into a finding that the contractor is liable to the government for the entire amount of its claim now hangs over every request to modify any substantial government contract. That looming prospect of massive liability will discourage companies from contracting with the government, for fear of the harsh penalties they may face if they submit claims that are later found even partially inaccurate. Those who do continue to contract with the government will be less likely to submit claims identifying projected cost overruns that, through contract modification, could result in significant savings for the government or will factor this risk into their prices, raising the government's costs accordingly.

2. Respondent misreads the court of appeals' decision and advocates an interpretation of the Contract Disputes Act that is inconsistent with the statute's plain language. Respondent reads Section 604 as providing for a penalty equal to the

amount of a contractor's claim that is "unsupported," *without regard* to whether it rests on fraud. DWEC's damages projection was "unsupported," the government says, because DWEC "made no meaningful effort to identify or substantiate any sums to which it *was* entitled." BIO at 8 (emphasis in original). Respondent further argues that, "[i]f a contractor's fraudulent demand for payment reflects no reasonable effort to identify and substantiate the facts bearing on the contractor's entitlement to federal funds, the government is entitled under the [Contract Disputes Act] to damages in the full amount of the demand, even if the contractor might have been able to prepare and file a *different* claim that established its entitlement to a lesser sum." BIO at 9 (emphasis in original).

Respondent's argument disregards the actual language of Section 604, which makes clear that the statute does not penalize claims that are merely "unsupported." Rather, it penalizes "any part" of a claim that the contractor is "unable to support" *because of* "misrepresentation of fact or fraud on the part of the contractor." 41 U.S.C. § 604. The proper amount of the penalty is the amount "equal to *such* unsupported part of the claim." *Id.* (emphasis added). Respondent essentially argues that all unsupported claims are by definition fraudulent, but the statutory language is plainly premised on the far narrower notion that a claim can be unsupported because of misrepresentation or fraud *or* it can be unsupported for other, non-fraudulent reasons. To establish an entitlement to a penalty, the government has to prove not just that the claim is not supported, but also that the contractor's inability to

support the claim is attributable to misrepresentation of fact or fraud. Congress's determination to require a more rigorous showing under Section 604 is not surprising, given the extreme nature of the penalty involved, which as this case illustrates can easily amount to tens of millions of dollars.[1]

Here, the $50.6 million penalty is justified under Section 604 only if DWEC committed fraud with respect to the "part[s]" of the claim that make up that dollar amount – *i.e.*, every dollar of the projection. But not even the government seriously argues that is so. To reach that conclusion would require finding that DWEC actually knew that it was not entitled to *any* future damages, either because it knew that the underlying claims were meritless or because it knew it would not incur any recoverable costs going forward. The trial court certainly made no such finding that at the time it submitted its claim DWEC

---

[1] The government cannot lean on the Federal Circuit's comment that DWEC made "virtually no effort to show that the Court of Federal Claims' findings of fraud are clearly erroneous." Pet. App. 15a. The trial court did not find that the entire claim was fraudulent, except insofar as DWEC's purpose in alerting the government to the potential future damages was, at least in part, to persuade the government to change the contract requirements in order to avoid those costs. DWEC argued below – and both the Federal Circuit and the government agree – that such a purpose does not render the claim fraudulent. Because appellate courts decide questions of law rather than fact, petitioner has accepted *arguendo* the trial court's determination that isolated components of its projection were fraudulent. The Federal Circuit's legal error was in failing to limit the penalty imposed to those parts of petitioner's claim.

believed that it was not entitled to any future damages whatsoever.[2] Nor could there be, given that DWEC incurred massive losses exceeding $100 million on the project. The Federal Circuit's opinion made clear that the penalty was *not* based on the notion that the underlying claims were meritless. Pet. App. 13a. Absent such a finding, the government's argument reduces to a simple, but erroneous, recasting of the Contract Disputes Act to provide for a penalty in the full amount of the claim whenever a portion of the claim is deemed to be unsupported. As a matter of law, respondent's and the Federal Circuit's interpretation of Section 604 is dangerously incorrect.

3. Respondent's effort to conjure a rationale for the Federal Circuit's decision leads it to argue that a contractor can be liable for a fraud penalty in the full amount of its claim even if the underlying claim is valid and the contractor would be entitled to some damages if they were calculated differently. BIO at 9. Respondent posits, without citation to authority, that a claim, even a valid one, is fraudulent *in toto* if the claim "reflects no reasonable effort to identify and substantiate the facts bearing on the contractor's

---

[2] Respondent repeatedly emphasizes the court of appeals' criticism that, at trial, DWEC's retained damages experts "treated the certified claim computation as essentially worthless, did not utilize it, and did not even bother to understand it." Pet. App. 14a. In addition to being irrelevant to the question of how much of the $50.6 million projected damages claim was fraudulent, this ignores the fact that DWEC's damages experts calculated approximately $29 million in actual damages through June 2003.

entitlement to federal funds." *Id.* Even setting aside the fact that DWEC's extensive, detailed claim submission hardly meets respondent's novel "no reasonable effort" standard, this extraordinary reading of Section 604 would render fraudulent any claim that is found to be the product of a level of effort that is later deemed "unreasonable." This would stretch the concept of "fraud" in Section 604 to cover mere negligence and incompetence, rather than deliberate deception, as was clearly intended by Congress. It would also defy congressional intent: "[t]o the extent that contractors set forth claim items and costs on which they can submit a legitimate argument for recovery, [the Act] would not apply." S. Rep. No. 95-1118, at 20 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5254. Hypothetically, if a contractor submitted a $50 million claim but failed to support the entire dollar amount, and were to demonstrate a legitimate argument for $40 million of the claim, the Contract Disputes Act would impose a fraud penalty of $10 million (the "unsupported *part* of the claim"), not $50 million.

4. Respondent acknowledges that the Federal Circuit has exclusive jurisdiction over suits brought under the Contract Disputes Act, and does not dispute that an erroneously broad interpretation of Section 604 by the Federal Circuit would discourage contractors from doing business with the government and from submitting legitimate claims, resulting in higher contracting costs for the government. As *amicus curiae* The Washington Legal Foundation points out, nearly 200,000 businesses sell goods and services to the federal government pursuant to contracts totaling in the hundreds of billions of

dollars. Every one of those contracts are subject to the requirements of the Contract Disputes Act and every one of those businesses are exposed to liability to the government under Section 604, as newly interpreted by the Federal Circuit. WLF *amicus curiae* brief at 2-3, 12.

Respondent contends that petitioner has not shown that the question presented here has arisen or will arise with any frequency, but as noted, the ruling below governs claims submitted under virtually every significant government contract. Further, the deleterious consequences of the Federal Circuit's new and startlingly broad interpretation of Section 604 will occur even if the issue is never litigated again. In enacting the Contract Disputes Act, Congress was acutely aware that "the way potential contractors view the disputes-resolving system influences how, whether, and at what prices they compete for government contract business." S. Rep. No. 95-1118, at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5238. Some meaningful fraction of the hundreds of thousands of government contractors will be deterred from doing business with the government, or will price their goods and services higher than they otherwise would, out of fear of the crippling liability they could suffer under Section 604 if they submit a claim for money that is later found to be even partially inaccurate or compiled with a level of effort that is later deemed unreasonable.

As the *amicus curiae* brief further notes, the Federal Circuit's decision in this case will necessarily lead to an increase in contractor costs, and hence government costs, of preparing claims for submission to the government. According to the government,

even valid claims potentially give rise a fraud penalty for the full amount of the claim if the government deems – *post hoc* – the contractor's effort in drafting its claim to be unreasonable or its claim calculation to be insufficiently precise. Contractors will be all but required to incur the costs of damages experts in preparing claims for even modest amounts, or else risk a "fraud" penalty under Section 604, as well as the other consequences of such a finding (e.g., forfeiture of valid claims and debarment from further government contracting). This added burden will affect all contractors, but especially small businesses who can least afford these additional costs, and construction contractors like DWEC, who often need to bring large claims on short notice.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition and supporting *amicus* brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Thomas C. Goldstein
Counsel of Record
Thomas P. McLish
Paul W. Killian
Troy D. Cahill
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000

October 14, 2009